IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 88

WCC No. 9307-6861

ROSALIE WARBOYS

Petitioner

vs.

EMPLOYERS INSURANCE OF WAUSAU

Respondent/Insurer for

ST. REGIS CORPORATION

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on October 14, 1993, in the Flathead County Justice Center, Kalispell, Montana. Petitioner, Rosalie Warboys (claimant), was present and represented by Mr. Allan M. McGarvey. Respondent, Employers Insurance of Wausau (Wausau), was represented by Mr. Michael C. Prezeau.

Claimant testified on her own behalf. The parties each offered testimony from a vocational consultant; claimant called Mr. Dan Schara and Wausau called Ms. Terri Roach. In addition, the testimony of Albert Joern, M.D. and William Riddel, D.C. was presented by deposition.

Seven exhibits, including claimant's medical records, were offered into evidence. Claimant objected to pages 48-51, 56-62, and 101-112 of the medical records, identified as Exhibit 1, on the ground that the records in question relate to treatment for conditions which are not related to the claim in question and are therefore irrelevant. Having had to read the records to determine their relevancy, the Court now determines that the records should be admitted but finds that they have minimal relevance to the resolution of the issues raised by the petition.

Having considered the Pretrial Order, the testimony presented at trial and by deposition, the demeanor of the witnesses, the exhibits, and the pleadings of the parties, the Court makes the following:

FINDINGS OF FACT

1. At the time of trial the claimant was forty-seven years old.

2. Claimant was employed in the plywood department of the Champion (formerly St. Regis) Mill in Libby, Montana for approximately twenty years. She began work at Champion in 1972 and worked there in various positions until May 31, 1992.

3. When she was first employed by Champion, claimant was assigned to the labor pool and performed heavy labor. Among the jobs she held was one on the "dry belt," which involved continuous, very heavy work. The dry belt job requires the worker to pull pieces of wood six feet long and fourteen to twenty-seven inches wide off a conveyor belt and stack them.

4. After approximately four years in the labor pool, claimant successfully bid on a plugger operator job. Physically, that job is one of the easiest ones at Champion. The job entails sliding a single sheet of veneer onto a table and putting in plugs where necessary, then sliding the veneer off the table.

5. On March 13, 1985, the claimant was assigned to the dry chain for a day. While twisting to lift a load of wood she felt a "pop" in her neck. She thereafter experienced a headache and tingling in her hand.

6. Claimant timely reported her injury and filed a claim for compensation.

7. At the time of claimant's March 13, 1985 injury, St. Regis was insured by Wausau, which accepted liability for the claim.

8. Following her injury claimant was treated by Dr. Stephen Hufman, a physician in Libby, Montana. Dr. Hufman diagnosed claimant's condition as "[c]ompression neuropathy secondary to working on the belt." (Ex. 1 at 1.) Dr. Hufman prescribed medication.

9. Claimant missed work, off and on, for approximately one month. When claimant was released to return to work, she returned to her normal position as a plugger operator, although she was restricted by Dr. Hufman from working on the "belt." It is unclear from Dr. Hufman's records whether this restriction was intended to be temporary or permanent. (Ex. 1 at 1-7.)

10. Although the claimant sought little medical care during the two years immediately following her return to work, she continued to suffer symptoms related to her neck, primarily soreness and stiffness of the neck, along with headaches. She was seen in the emergency room on April 25, 1986, a year after her return to work, for a headache and pain in her shoulder and neck. Her condition was diagnosed as a muscle tension headache (Exhibit 1 at 12) and may have been unrelated to her 1985 injury. However, commencing in May 1987 claimant began chiropractic treatment for neck stiffness and pain. (Ex. 1 at 13; Riddel Dep. at 4.)

11. Since 1987 claimant has received numerous chiropractic treatments from Dr. William J. Riddel. While some of the treatments were related to a subsequent low-back injury, a majority of the treatments were related to claimant's neck condition.

12. On March 18, 1988, Dr. John V. Stephens, who specializes in physical medicine and rehabilitation, examined claimant at Dr. Riddel's request. In his history Dr. Stephens noted, among other things:

This is a 41-year old right-handed white female with headache and neck discomfort. She relates that she was in good health with no prior problems with her neck though she did have occasional headaches until 03/13/85, when while pulling wood off the dryer she noticed severe discomfort at the base of her neck, in her arms, and a headache. . . . She relates that she still has soreness at the base of her skull and occasional aching into the entire circumference of the arms, and an intermittent headache that begins posteriorly at the base of her neck and comes forward. She relates that the headaches do not occur every day now but that she does have the aching in the neck most of the time. . . .

(Ex. 1 at 70.)

13. In June 1991 the claimant was examined by Dr. Albert T. Joern, an orthopedic surgeon. Following the examination, Dr. Joern commented as follows:

In terms of reviewing the medical records and Ms. Warboys history, it is possible to now see that she had more than a simple strain-type injury in 1985 at the time of her accident. The injury involved the C6-7 functional spinal unit or motion segment. There was an internal disruption of the disc at that level and possibly derangement of other structural elements of the functional unit. This produced a condition of chronic cervical instability with a secondary myofascial component characterized by the chronic muscle spasms. The condition has evolved to a point now where she has developed a secondary myofascial deconditioned problem involving the muscles as described in the physical examination.

(Ex. 1 at 97.) Dr. Joern concluded that claimant needed further treatment and had not reached maximum medical improvement with respect to her cervical injury. (*Id.*) He subsequently gave claimant a ten percent (10%) impairment rating based solely on her neck condition.

14. Claimant continued to work at Champion until May 31, 1992. During that time she missed only a few days of work. However, her ability to work was augmented by her chiropractic treatments. In his June 20, 1991 report, Dr. Joern noted, "The chiropractic treatments have obviously been of benefit in keeping Ms. Warboys on the job." (Ex. 1 at 97.)

15. In 1986 the claimant was bumped from her position as a plugger by another employee with greater seniority. She was transferred to the position of clipper operator. That position primarily involves "pushing buttons." Material is dropped onto a table and defects are

clipped out. The only physical labor necessary was occasionally unclogging wood jams. The physical demands are similar to the demands of the plugger position.

16. Claimant worked as a clipper operator until 1987. The Champion plant was then modernized and that position eliminated. At that time claimant transferred to a position as a stacker operator. The principal duties of that job also involved pushing buttons. However, claimant was also required to pick up wood and put it on a conveyer belt. This task was more physically demanding. Claimant experienced enhanced pain and after six months told her supervisor that she was unable to continue in that position.

17. Claimant then returned to her position as a plugger and worked at that position until May 31, 1992.

18. On April 29, 1988, claimant suffered another work-related injury, this time to the low back.

19. In 1989 claimant also injured her left shoulder while at work. This injury resolved.

20. In August of 1991, claimant was diagnosed as suffering from carpel tunnel syndrome. (Ex. 1 at 68.)

21. On May 31, 1992, claimant suffered an exacerbation of her 1988 low-back injury. The exacerbation has precluded her from returning to work at any position at Champion.

22. Claimant has settled her low-back claim on a final compromise basis. (Ex. 6.)

23. Following her cessation of employment, claimant's neck condition further deteriorated. In September 1993, Dr. Joern concluded that the worsening of claimant's cervical condition in itself precluded her return to work at any job in the wood products industry, including the job of plugger. He testified by deposition that the worsening of her condition was the result of a natural progression of her injury. (Joern Dep. at 18.)

24. In light of claimant's ability to continue working for approximately seven years following her cervical injury, and the rapid decline of claimant's cervical condition once she stopped working, the Court is skeptical that claimant's condition would have declined as remarkably had she continued to work. Nonetheless, I am persuaded by a preponderance of evidence, that claimant's 1985 injury precluded her from ever going back to work at the more physically demanding jobs at Champion or other mills, and that she was restricted to working at less physically demanding jobs such as plugger.

25. Both vocational experts agreed, and the Court finds, that workers in the open labor market who seek lumber mill employment must be able to perform entry level, heavy labor positions, such as the green chain and the dry chain. Less demanding jobs at mills are filled on the basis of seniority. Thus, had claimant lost her job at Champion after her 1985 injury she would not have been able to obtain a mill job suitable to her physical restrictions.

26. Claimant's only other work experience, which was more than twenty years ago, was as a waitress.

27. Claimant's vocational expert testified that as a result of claimant's 1985 injury her earning capacity in the open labor market is $4.25 to $5.00 an hour. At the time of claimant's injury she was earning $10.60 an hour. The expert's opinions were based solely on claimant's 1985 injury and did not consider the effect of claimant's 1988 low-back injury.

28. Claimant's vocational expert also testified that as a result of her 1985 injury claimant had lost access to eighty-five to ninety percent (85% - 90%) of her pre-injury labor market.

29. Wausau's vocational expert did not appropriately assess claimant's post-injury earning capacity in the **open labor market**. She testified that the injury had no effect on earning capacity because claimant was able to return to her time-of-injury job and was ultimately taken off work because of a superseding injury. Her testimony failed to apply the appropriate legal standard. The claimant's expert's testimony is therefore the more persuasive.

30. As a result of her 1985 injury, claimant suffered a loss of earning capacity of at least $5.60 an hour ($10.60 minus $5.00). On a weekly basis her loss of earning capacity is $224.00, two-thirds of which is $149.33.

CONCLUSIONS OF LAW

1. The general rule is that the claimant bears the burden of proof. ***Ricks v. Teslow Consolidated****, 162 Mont. 469, 483, 512 P.2d 1304 (1973);* ***Dumont v. Wickens Bros. Const. Co.,*** *183 Mont. 190, 201, 598 P.2d 1099 (1979).* Recently, the Supreme Court held that claimant's burden of proof extends to proof "that a causal connection exists between his work injury and his current condition." ***Walker v. UPS,*** *262 Mont. 450, 865 P.2d 1113 (1993).*

2. The claimant has carried her burden of proof in establishing that she was disabled on account of her 1985 injury. While she returned to her time-of-injury job, her cervical condition continued to trouble her and precluded her from performing the heavy-labor type jobs she had performed prior to her injury.

3. The statutes in effect on the date of injury must be applied in determining benefits. ***Buckman v. Montana Deaconess Hospital****, 224 Mont. 318, 321, 730 P.2d 380 (1986).* Claimant was injured on March 13, 1985, thus the 1983 version of the Workers' Compensation Act applies.

4. The claimant is seeking a permanent partial disability award pursuant to section 39-71-703, MCA (1983), which provides:

39-71-703. Compensation for injuries causing partial disability. (1) Weekly compensation benefits for injury producing partial disability shall be 66 2/3% of the actual diminution in the worker's earning capacity measured in dollars, subject to a maximum weekly compensation of one-half the state's average weekly wage.

(2) The compensation shall be paid during the period of disability, not exceeding, however, 500 weeks in cases of partial disability. However, compensation for partial disability resulting from the loss of or injury to any member shall not be payable for a greater number of weeks than is specified in 39-71-705 for the loss of the member.

Since claimant suffered an unscheduled back injury, the 500 weeks limitation applies.

Lost earning capacity has been defined as the "permanent diminution of the ability to earn money in the future." ***Chagnon v. Tilleman Motor Co.****, 259 Mont. 21, 26, 855 P.2d 1002 (1993)*. The Supreme Court's recent decision in ***Reeverts v. Sears, Roebuck & Co.***, *Slip Opinion (September 16, 1994),* makes it clear that a claimant's ability to return to her time-of-injury job and earn as much or more than her time-of-injury wage is not the measure of post-injury earning capacity. The correct test for loss of earning capacity is whether the injury has caused "a loss of ability to earn on the open labor market." ***Beck v. State Compensation Mutual Insurance Fund****, 230 Mont. 294, 297, 749 P.2d 527 (1988)(quoting from* ***Shaffer v. Midland Empire Packing Co.,*** *127 Mont. 211, 213-14, 259 P.2d 340 (1953)*. The loss is "determined by comparing earning capacity absent injury with earning capacity given the injury." ***McDanold v. B.N. Transport, Inc.,*** 208 Mont. 470, 479, 679 P.2d 1188 (1984). It includes consideration of such factors as "age, occupational skills, education, previous health, remaining number of productive years and degree of physical or mental impairment." ***Chagnon,*** *259 Mont. at 26 (1993) (quoting Hurley v. Dupuis, 233 Mont. 242, 246, 759 P.2d 996, 999 (1988));* ***Sedlack v. Church Mutual Insurance,*** *230 Mont. 273749 P.2d 1085 (1988)*.

In this case, a preponderance of the evidence establishes that the 1985 injury caused a significant loss of ability to compete in the open labor market. At the time of her injury claimant held a relatively high paying job that required only a small amount of physical labor. Although she was able to return to that job and continue working at it for a number of years, if for any reason had she lost that job, her employment prospects would have been dim. Due to seniority systems in lumber mills, her only route to a position as a plugger or some other lighter-duty mill job was through entry-level, heavy labor jobs. But her 1985 injury precluded her from working at those heavy-labor jobs and thereby precluded her from working her way back up to a high paying position within her physical capabilities.

The decision in ***Reeverts*** also makes it abundantly clear that claimant's entitlement to benefits respecting her 1985 injury must be considered on its own merits and that her entitlement is not cut off because of a subsequent, even more disabling injury. "We hold that when Reeverts went back to work and re-injured herself, she did not lose the right to

receive the partial disability benefits to which she was entitled as a result of her prior injury." *Slip Opinion at 14*.

Wausau also argues that the claimant's loss of earning capacity has already been compensated by fact of the settlement of her low-back claim. (Respondent's Proposed Findings at 8; Respondent's Brief at 10.) In pre-1987 law cases, where a claimant has suffered a loss of earning capacity as a result of an injury, the post-injury earning capacity may be the benchmark for any subsequent injury. For example, where a claimant whose earning capacity is reduced from $10.00 an hour to $8.00 an hour as the result of a first injury thereafter suffers a second injury, which reduces his or her earning capacity to $6.00 an hour, the loss of earning capacity with respect to the second injury is $2 an hour, not $4 an hour. This is because the claimant's earning capacity immediately prior to the time of the second injury (assuming no change in condition, education or other relevant factor) was $8.00, not $10.00. Where a claimant settles the second injury first, and does so on the representation that earning capacity was $10.00 an hour immediately prior to the second injury, he or she may be estopped from claiming lost earning capacity with respect to the first injury. Estoppel, however, is neither alleged nor proven in this case. Moreover, permanent partial disability benefits with respect to claimant's 1988 injury are governed by a different standard. In 1987, the legislature amended section 39-71-703, MCA, to provide for "wage supplement benefits" based on the "difference between the worker's **actual wages** received at the time of the injury and the wages the worker is qualified to earn in the worker's job pool." Laws of Montana, ch. 464, § 23. Thus, Wausau's argument must fail.

5. Claimant has demonstrated a loss of earning capacity in the amount of $224.00 a week. Using the two-thirds formula of section 39-71-703, MCA (1985), she would be entitled to $149.33 weekly for 500 weeks. Since this exceeds the statutory maximum, the maximum applies. She is therefore entitled to $143.00 a week for 500 weeks, retroactive to the date of her injury, less any amounts of permanent partial disability benefits already paid by Wausau.

6. Claimant is entitled to attorney fees and costs pursuant to section 39-71-612, MCA (1985), since she has prevailed in this action.

JUDGMENT

1. Claimant is entitled to $143.00 a week for 500 weeks, retroactive to the date of her injury, less any amounts of permanent partial disability benefits already paid by respondent.

2. The insurer is liable for costs and attorney fees in an amount to be determined by the Court.

3 The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

4. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 22nd day of September, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Allan M. McGarvey
Mr. Michael C. Prezeau